

BI-LATERAL INTER-OPERATOR SHORT MESSAGE SERVICE AGREEMENT
ON DELIVERY FEE

THIS AGREEMENT is made on the _____ day of _____ 2001

BETWEEN

AND

WHEREAS:

- A. _____ are two telecommunication operators which are licensed to provide Mobile Services under a Public Radiocommunication Service Licence issued by the Hong Kong Telecommunications Authority under the Telecommunications Ordinance.
- B. _____ have simultaneously respectively entered into Inter-Operator Short Message Service Agreement with the Contractor to acquire rights to use certain Inter-Operator Short Message Service and facilities provided by the Contractor as defined in the Inter-Operator Short Message Service Agreement subject to the same terms and conditions with respect to their respective rights and obligations to the Contractor.
- C. _____ have agreed to enter into this Agreement to regulate the Delivery Fee payable by the Originating Operator to the Terminating Operator for every successful Delivery of SMS to the Terminals of the Terminating Operator Subscribers.

NOW IT IS HEREBY AGREED as follows:

- 1. Definitions and Interpretation
- 1.1 Terms defined in the Inter-Operator Short Message Service Agreement have the same meaning when used in this Agreement unless otherwise specified in the Agreement.

1.2 The following terms used in this Agreement will have the following meanings, unless otherwise stated.

- “Affiliate” of a party means an entity which controls, is controlled by, or is under common control with, that party;
- “Commencement Date” means the date first above written;
- “Contractor” means the service provider that provides the Inter-Operator Short Message Service to
- “Delivery” means the delivery through the Inter-Operator Short Message Service of SMS from the Terminals of the Originating Operator Subscribers to the Terminals of the Terminating Operator Subscribers;
- “Delivery Fee” means the fee described in Clause 2.1 payable by the Originating Operator to the Terminating Operator for each successful Delivery;
- “Inter-Operator Short Message Service” means the Inter-Operator Short Message Service (as defined in the Inter-Operator Short Message Service Agreement) provided by the Contractor pursuant to the Inter-Operator Short Message Service Agreement;
- “Inter-Operator Short Message Service Agreement” means the respective agreement entitled the “Agreement for the Supply of Inter-Operator Short Message Service” between the Contractor and
- “Mobile Services” means the Public Mobile Radiotelephone Services and/or Personal Communications Services provided by under its respective Public Radiocommunication Service Licence;
- “Originating Operator” means either from whose mobile network the SMS is sent by the Originating Operator Subscriber.;
- “Originating Operator Subscriber” means the subscriber of the Originating Operator’s Mobile Services;
- “Payment Operator” means either which is making the payment of Delivery Fee pursuant to Clause 3;

“Payment Receiving Operator”	means either _____, which is receiving payment of Delivery Fee pursuant to Clause 3;
“SMS”	means a short message sent by the Originating Operator Subscriber to Terminating Operator Subscriber(s) utilising the Inter-Operator Short Messaging Service;
“Successfully Delivered SMS”	means a short message is considered successfully delivered to the Terminating Operator Subscriber Terminal (or mobile devices) if the Inter-operator Short Message Service of the Contractor receives a successful delivery report message from the SMSC (short message centre) of the Terminating Operator;
“Terminals”	means the mobile devices of the Originating Operator Subscribers or the Terminating Operator Subscribers;
“Terminating Operator”	means either _____ which is in receipt of a SMS on its network from the Originating Operator Subscriber and delivers such SMS to the Terminating Operator Subscriber’s Terminal;
“Terminating Operator Subscriber”	means the subscriber of the Terminating Operator’s Mobile Services.

1.3 In this Agreement, unless the context otherwise requires:

- (a) any reference to a provision of any Ordinance is a reference to that provision as amended, extended or re-enacted from time to time;
- (b) unless the context otherwise requires, words importing the singular number shall include the plural and vice versa, persons shall include bodies corporate and partnerships, references to any gender shall include all genders and references to any agreement or other instrument shall be deemed to include references to such agreement or other instrument as varied or replaced from time to time;
- (c) any reference to days are to calendar days unless stated as working days which are deemed to be the five (5) days Monday through Friday, and any reference to months or years are to calendar months or years.

2. Delivery Fee

2.1 The Originating Operator shall pay the Terminating Operator Hong Kong Dollars Thirty Cents (HK\$0.30) for each Successfully Delivered SMS.

3. Payment

- 3.1 On the _____ of each month, _____ will each receive a monthly billing report from the Contractor, setting out details of the SMS sent and received by each party in the preceding month.
- 3.2 Any discrepancy between the monthly billing report and the records kept by _____ should be raised with the Contractor within _____ of the receipt of the monthly billing report. If no discrepancy is raised within such period, the monthly billing report will be deemed to have been accepted by _____.
- 3.3 The amount of Delivery Fee to be charged by _____ against each other shall be set off based on the billing report received from the Contractor. The Payment Receiving Operator will on _____ of each month issue an invoice to the Payment Operator for the net balance of the Delivery Fee. The Payment Operator shall settle the invoice within _____ from the date of invoice (“the due date”).
- 3.4 In the event that the discrepancy between the monthly billing report and the record of either _____ (as the case may be) cannot be reconciled after raising and checking with the Contractor, such discrepancy shall be waived if the aggregate amount thereof amounts to less than Hong Kong Dollars Two Thousand (HK\$2,000) or one percent (1%) of the total net amount of the Delivery Fee payable by the Payment Operator or due to the Payment Receiving Operator, whichever is lower. Notwithstanding the discrepancy, _____ shall set off the Delivery Fee to be charged against each other based on the monthly billing report received from the Contractor in the same manner as described in Clause 3.3.
- 3.5 _____ agree to settle any dispute in respect of payment of the Delivery Fee in accordance to the following procedures:
- (a) if the Payment Operator wishes to raise a bona fide dispute, the Payment Operator must _____ of the date of the invoice notify the Payment Receiving Operator in writing specifying the invoice in dispute, the amount in dispute and the reasons and facts for the dispute;
 - (b) in the event of a failure or non-availability of the Payment Operator’s system, the Payment Operator must pay the invoiced amount in full pending resolution of the system failure or non-availability and any resulting bona fide dispute;
 - (c) the Payment Operator and the Payment Receiving Operator must use their best endeavors to investigate and resolve a bona fide dispute no later than _____ working days from the date of dispute notification according to Clause 3.5(a);
 - (d) if the dispute cannot be resolved within _____ working days from the date of dispute notification according to Clause 3.5(a) or any other period of time agreed by both Payment Operator and Payment Receiving Operator, then either Payment Operator or Payment Receiving Operator may refer the matter to arbitration in accordance with the Arbitration Ordinance;

- (e) if the Operators are unable to agree on the appointment of an arbitrator, an arbitrator shall be appointed by the President for the time being of the Law Society of Hong Kong; and
 - (f) a decision of the arbitrator will be binding on the Payment Operator and the Payment Receiving Operator except in the event of manifest error or mistake of law.
- 3.6 The Payment Operator shall pay the Receiving Payment Operator by cheque unless otherwise agreed by writing.
- 3.7 If the Payment Receiving Operator does not receive the invoiced amount of Delivery Fee by the due date, the Payment Operator must pay interest in respect of the overdue amount calculated at from the due date until the full payment of the amount of the overdue amount is received.
4. Confidentiality
- 4.1 Each party agrees to keep and procure to be kept secret all written and/or oral information of any kind (hereinafter called the "Confidential Information") obtained from the other party pursuant to this Agreement or prior to it.
- 4.2 Each party shall not at any time divulge, disclose or otherwise furnish to any third party any information relating to the affairs or business of the other party.
- 4.3 Each party shall reveal the Confidential Information only to its employees, agents, contractors or Affiliates to whom disclosure is necessary for each of them to perform his duties for this purpose of this Agreement. Each party shall require the above obligation of confidentiality from its employees, agents, contractors and Affiliates.
- 4.4 The foregoing obligations shall not apply, however, to any part of the Confidential Information which:
- (a) was already known to the recipient party prior to receipt thereof;
 - (b) was already in the public domain or becomes so through no fault of the recipient party;
 - (c) was acquired by the recipient party from a third party having the right to convey the Confidential Information to the recipient party without any obligation of confidentiality not to disclose the same;
 - (d) is independently developed by the recipient party;
 - (e) is approved for release by prior written authorization by the disclosing party;
 - (f) is required to be disclosed by law or pursuant to a juridical order.
- 4.5 Subject to the provision in Clause 4.4 above, these obligations of confidentiality shall survive after the termination of this Agreement.

4.6 The terms of this Agreement shall remain private and confidential between the parties and neither party shall, without the prior written consent of the other party, divulge to any third party (other than professional or financial advisers of either party) or use for any purpose other than for the performance of its obligations under this Agreement, any information concerning this Agreement save for the purpose of any filing of information with or requirement of government bodies under statutory requirements, or a stock exchange in which either party's shares are traded.

5. Term

5.1 This Agreement shall commence from the Commencement Date subject to the provisions of termination contained in Clause 6.

6. Termination

6.1 Either party shall have the right to terminate this Agreement forthwith by giving to the other party notice in writing to that effect in any of the following events:

- (a) if the other party is in breach of any of its obligation hereunder and fails to remedy such breach (if capable of remedy) of receiving a written notice so to do;
- (b) if the other party is subject to the law as to insolvency and/or bankruptcy or makes any arrangements or composition with its creditors or has a Receiver appointed or enters into liquidation (other than a voluntary liquidation for the purpose of reconstruction or amalgamation); or
- (c) if either party's Inter-Operator Short Message Service Agreement is expired or terminated.

7. Review

7.1 The parties shall review the terms and conditions of this Agreement after the Commencement Date. Thereafter, the parties shall review the terms and conditions on each anniversary date from the Commencement Date.

8. Applicable Law and Settlement of Dispute

8.1 The validity and interpretation of this Agreement shall be governed in all respects by the laws of Hong Kong Special Administrative Region. Save for the dispute procedure set out in Clause 3.5, the parties shall submit to the jurisdiction of the courts of Hong Kong Special Administrative Region for settlement on any dispute.

9. Exclusion of Liability

9.1 Notwithstanding any other provisions contained elsewhere in this Agreement, under no circumstances whatsoever (including other negligence or breach of statutory duty) shall either party be liable to the other party or to any other person, body of persons or corporation for any

indirect or consequential loss including but not limited to loss of revenue, business or profits suffered or alleged to have been suffered by the other party or any other party or any other person, body of persons or corporation resulting from any reason or cause whatsoever under this Agreement.

10. No Partnership

10.1 Nothing in this Agreement shall constitute or be deemed to constitute a partnership between the parties hereto or constitute or be deemed to constitute that one party act as an agent of the other for any purpose whatsoever and neither party shall have the authority or power to bind the other or create a liability against the other in any way or for any purpose.

11. Assignment

11.1 Neither party shall assign, transfer, convey, license or otherwise dispose of, wholly or partially, the rights and obligations under this Agreement except with the prior written consent of the other party.

11.2 Notwithstanding the provisions of Clause 11.1, in the event of an assignment being made as a result of a reconstruction or merger within the group of companies of either party, the consent of the other party to the assignment is not necessary. Prior notification of any such assignment shall be given.

12. Entire Understanding

12.1 This Agreement embodies the entire understanding between the parties in relation to the subject matter hereof and there are no promises, terms conditions or obligations, oral or written expressed or implied other than those contained herein. No amendment or variation of this Agreement shall be effective unless it is in writing and signed by the parties hereto.

13. Notices

13.1 Any notice required to be given hereunder shall be sufficiently given if sent by facsimile or registered post address to the principal or registered office of the party to be served. Any such notice shall be deemed to have been received and given at the time when in the ordinary course of transmission it should have been delivered at the address to which it was sent.

14. Severability

14.1 If any provision of this Agreement shall be construed to be illegal or invalid, they shall not affect the legality validity and enforceability of the other provisions of this Agreement. The illegal or invalid provision shall be deleted from this Agreement and no longer incorporated herein but all other provisions of this Agreement shall continue.

